Some approaches to statutory interpretation

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1. Introduction

1.1 The importance of statutory interpretation

There is barely an area of modern legal practice that is not touched directly by statute law. Pearce and Geddes[1] record that in 1950, the entire output of Commonwealth law for the year was published in one, 283 page volume. By 2001, a little more than fifty years later, the year's output had expanded to fill five volumes, taking up 4383, numbered pages.

By the following year, that output had increased to seven volumes, and the indexers abandoned the practice of numbering each page.

In the face of this increase, Gleeson CJ observed[2]:

"One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now found in Acts of Parliament rather than judge-made principles of common law (in which I include equity). A federal judge devotes almost the whole of his judicial time to the application an Act of the federal parliament, whether it be about corporations law, or bankruptcy, or family law, or migration."

[1] *Statutory Interpretation in Australia*, 7th ed. (2011), Pearce and Geddes, at [1.12].
[2] "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights", Victoria Law Foundation Oration, Melbourne, 31 July 2008, p1.

Much the same thing has occurred at state level, prompting former NSW Chief Justice Spigelman to say[3]:

"The law of statutory interpretation has become the single most important aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of law has escaped statutory modification."

In other words, statutory interpretation is at the heart of what we have to do as lawyers, whatever area we practice in.

1.2 What this paper covers

In the following paper, I will start with a statement of broad principle about the task of statutory interpretation.

I will then consider the language and principles we use to explain the process of interpreting the statute as a whole.

I will digress then to tell you the two main additional things you need to know about delegated legislation.

Finally, I will talk about what might loosely be called the "common law presumptions", and I'll consider closely one area where they have been applied. The application of the common law presumptions is one of the most interesting areas of statutory interpretation, because it is an area where the courts can end up a long way from the apparent intention of the legislation.

Ultimately, the art of statutory construction only really comes alive when you seek to apply the tools of statutory construction in practice.

We will have the opportunity to put some of these principles to good use in the practical workshop later today.

[3] The Law of Quasi-constitutional Interpretation, Spigelman CJ of NSW, University of Queensland, 11 March 2008.

2. What do we mean when we say that the role of the courts is to "give effect to the intention of parliament"?

You will all be familiar with the most fundamental principle of all, which is that the court is required to give effect to the legislative purpose or intention of Parliament when it gives effect to a particular statutory provision.

Indeed, Gleeson CJ has just about captured all that is involved in interpreting a statute, admittedly in a rather concentrated and esoteric fashion, in the following passage[4]:

"The concepts of meaning and intention are related, but distinct.... The words are often used interchangeably. In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the 'intention of the legislature'. This has been described as a "very slippery phrase", but it reflects the constitutional relationship between the legislature and the judiciary.... Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will."

From this, we can draw out two broad points.

First, the starting point is the words of the statute itself. Ultimately, it is the statute itself from which the "meaning" or "intention" is derived. In 2012, the High Court emphasised the centrality of the text when their Honours said that though the statute must be considered in context, the search for legislative meaning begins with the statute, and ends with the statute[5].

Second, the meaning or intention of a statutory provision is to be determined with reference to *"the principles of construction established by the common law and statute"*.

It is with those common law and statutory principles that the bulk of this paper will be concerned. As will be seen, some of those principles can be employed to take the courts a long way from the apparent intention of the legislature.

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[4] *Wilson v Anderson* [2002] 213 CLR 401 [8]
[5] *FCT v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98, at [39], per curiam.

3. How to construe the statute itself

As the process of statutory construction begins and ends with the statutory text, the natural place to start is with some principles governing the reading of the text itself.

3.1 The statute is to be considered as a whole

The first and fundamental principle is that an Act has to be construed as a whole.

As the High Court put it in *Project Blue Sky*[6] (at [68]):

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed".

In other words, you cannot construe the meaning of a specific provision in an Act without considering the sections which surround it, and the structure and meaning of the Act as a whole. The Act should be construed so as to operate coherently, consistently, and harmoniously, as a whole.

3.2 The statute should be read in a way which is consistent, rational, and convenient

The most obvious implication of this contextual approach is that the Court should, where possible, interpret a provision of a statute in a way that best promotes the express or implied objects of the Act, avoids internal inconsistency, and avoids absurdity or inconvenience.

[6] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, at [68] – [70].

The requirement that the court should favour an interpretation which promotes the objects of the Act over one which does not finds statutory recognition in section 15AA of the *Acts Interpretation Act* 1901 (Cth) (and section 33 of the *Interpretation Act* 1987 (NSW)), which states:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object".

As Lord Diplock powerfully observed[7]:

"If...the Courts can identify the target of Parliamentary legislation their proper function is see that it is hit; not merely to record that it has been missed."

In Australia, the contemporary approach is outlined in *Cooper Brookes*, where Mason and Wilson JJ said[8]:

"Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute...

.....For the reason already given in the discussion of the literal rule, departure from the ordinary grammatical sense cannot be restricted to cases of absurdity and inconsistency…In some cases in the past these rules of construction have been applied too rigidly."

….when the judge labels the operation of the statute as "absurd", "extraordinary", "capricious", "irrational" or "obscure" he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be

[7] *"The Courts As Legislators" The Lawyer and Justice* 1978, Sweet & Maxwell, at p274. The passage is cited in numerous Australian judgments.
[8] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, at p320.

preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

In other words, whatever label is used to justify departing from the literal meaning of the text, the over-riding justification is that the departure from the literal meaning is necessary in order to avoid an interpretation which could not have been intended by parliament.

In that case, the High Court implied some words into a provision of a tax statute to avoid what they called "an oversight" by the draughtsman. Without the addition of these words, the result would have been "capricious and irrational".

2.3 Statutory presumptions developed to help read the statute as a whole

A number of further presumptions which aid the process of construction of the statute as a whole have been developed.

They reflect certain conventions or rules about how language operates generally, and in statutes in particular (in other words, they are directed to the syntax of statutes), and may readily be displaced, if it appears that a different meaning is intended.

2.3.1 Words and expressions are used consistently throughout a statute

There is a presumption that words are used consistently throughout a statute, and that different words or expressions in the same statute are intended to have different meanings[9].

3.3.2 Each word in a statute has work to do

Just as an Act should be read as a whole, each provision of an Act should be read as a whole. It is presumed that every word in a provision has work to do, so that each word should be given effect as far as possible[10].

[9] *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1, illustrates both propositions; there some sections referred to amounts being "due", and others to amounts being "due and payable"; the Court used the addition of the word "payable" to determine that the word "due" when it appeared on its own must mean merely not owing, and not "payable".

3.3.3 A word takes its meaning from the context in which it appears

This leads naturally on to the first of the principles still known by their Latin tag, *noscitur a sociis.* Literally, this means that "a thing is known by its associates". This is one of the consequences of considering the provision of an Act as a whole; the words of the section must be read in context, not viewed isolated from the words which surround them.

For instance, where the word "qualifications" was used in a section relating to the registration of medical practitioners, it was held to refer to academic qualifications, and not the wider meaning of personal qualities or accomplishments[11].

3.3.4 More general words in a list may be read down in light of the specific words which precede them

A closely related rule is the *ejusdem generis* rule; literally "of the same kind". Where a number of specific items are listed which all have a particular quality or are of a particular kind, and then a more general word is added, the more general word may be understood as being restricted to the same kind of items as those which preceded it.

For instance, in *Attorney General v Brown* [1920] 1 KB 773, the expression "any other goods" in a section which allowed regulations to prohibit the importation of "arms, ammunition, gunpowder or any other goods" was held to mean "good of the class of arms, ammunition and gunpowder".

As pyrogallic acid was a chemical used "for photography, hair-dyes and certain medicinal purposes", it was not of the same class as the other items, notwithstanding the Attorney-General's rather desperate argument that it was, because it could be used for photography, and photography is used in war.

The result was that pyrogallic acid was not caught by the definition, the regulation prohibiting it was invalid, and therefore its importation was not prohibited.

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[10] *Plaintiff M70/2011 v Minister of Immigration and Citizenship* (2011) 244 CLR 144 at [97].
[11] *R v Refshauge* (1976) 11 ALR 471 at 475.

3.3.5 Where a specific power with specific conditions attached to it applies, a more general power without such conditions attached will not apply

The final syntactical principle I want to deal carries the Latin tag *"expressum facit cessare tacitum"*, or "when there is express mention of certain things, then anything not mentioned is excluded".

In *Anthony Hordern*[12], Duffy CJ and Dixon J said:

"When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

In other words, it is not possible to avoid the conditions and restrictions imposed upon the exercise of a power which applies in particular circumstances by exercising a broader, less specific power which is not so limited instead.

In *Hordern*, the Industrial Relations Commission was not permitted to use the Commission's general power to "hear and determine industrial disputes" to make an order requiring female union members to be employed in preference to their non-union female colleagues.

That was because the legislation contained a specific provision which prescribed the circumstances in which orders preferencing unionists over non-unionists could be made, and the nature of the orders which could be made, and which would not extend to an order of the kind made by the Commission.

3.3.6 These and other syntactical rules of construction must be approached with caution

There are a number of other syntactical rules which may be useful in certain cases[13].

[12] *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, at 7.
[13] There is a full list and discussion in Pearce and Geddes, *op. cit.*, from [4.22].

They, along with the rules I have discussed, are useful tools which serve the greater purpose of construing the statute as a whole.

However, they are *"useful servants, but dangerous masters"*[14].

As Gummow and Hayne JJ observed in *Nystrom*[15]:

"whilst "rules" or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose."

4. Two Extrinsic aids to construction

The rules of construction which I have just discussed are all designed to facilitate the process of construing the statute as a whole. Now is a convenient time to mention a couple of further aids to construction which you should be aware of, which are extrinsic to the statute itself.

4.1 The statute is "always speaking"

The first is the principle that *in general*, a statute is "always speaking". This expression was best explained by the Court of Appeal in *Chubb Insurance*[16]:

"[A] statute should generally be construed as to apply to all things coming within the denotation of its terms, having regard to their connotation at the time of enactment. The connotation of a word or phrase is its essential attributes, which are to be determined as at the time of enactment. The denotation of a word or phrase is the class of things that, from time to time, may be seen to possess those essential attributes sufficiently to justify the application of the word or phrase to them."

So, for instance, where a statute enabled a local council to supply "gas", the High Court held that the council was permitted to supply liquified petroleum gas, even though this particular form of gas was not available in 1919, when the statute came into force[17].

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[14] *Houssein v Under-Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, at p94.
[15] *Nystrom* (2006) 228 CLR 566, at [54].
[16] *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212; (2013) 302 ALR 101, at [82], per Emmett JA and Ball J.

You will note that I said this rule applies *in general*. That is because it too is based upon a rebuttable presumption about what parliament intended. A contrary intention may appear from the text itself.

Pearce and Geddes, in their leading text, *Statutory Interpretation in Australia*[18], suggest that where the scope of a word has changed since its enactment, the question which will resolve whether a thing comes within the meaning of the word is:

"*Would the legislature have intended to include the activity or thing in the expression if it had known about it?"*.

4.2 Certain statutory definitions are contained in the *Acts Interpretation Act* (Cth) and the *Interpretation Act* (NSW) which will apply to Commonwealth and State legislation, unless a contrary intention appears

You should also be aware that the *Acts Interpretation Act* 1901 (Cth) and the *Interpretation Act* 1987(NSW) contain a number of statutory definitions which apply to Commonwealth and State legislation respectively unless the contrary intention applies[19].

I needn't list them in this paper, and will leave you to wile away a happy hour or two on your own exploring their rather dry content.

I have noted that the statutory definitions do not apply where a contrary intention appears from a proper construction of the statute. The same rule applies to statutory definitions contained within any Act[20].

An example of what it means to say that statutory definitions apply *unless the contrary intention appears* can be found in the application of section 9 of the *Interpretation Act* (NSW), which provides:

(1) In any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion.

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[17] *Lake Macquarie Shire Council v Aberdare County Council* (1972) 127 CLR 529.
[18] Pearce and Geddes, *Statutory Interpretation in Australia* (7th edition 2011) at [4.12].
[19] *Acts Interpretation Act* 1901(Cth), s2; *Interpretation Act* 1987 (NSW), s5(2).
[20] *Halford v Price* (1960) 105 CLR 23, at p33; *Interpretation Act* 1987 (NSW) s6.

(2) In any Act or instrument, the word "shall", if used to impose a duty, indicates that the duty must be performed.

Given that this definition like all others within the *Interpretation Act* applies unless the contrary intention is apparent, the courts have taken it simply to reflect the common law presumption[21].

In an excellent illustration of the dominance of "parliamentary intention" over our normal understanding of the english language, the courts are happy to treat "may" as meaning "must", and "must" as meaning "may", where that better reflects the legislative purpose.

5. Reading beyond the statute: extrinsic materials may be used to place the statute in context

We have observed that each Act is to be considered as a whole, and that the words and provisions of an Act are to be considered in context.

Context includes not only all the relevant provisions of an Act, but also other relevant materials. Traditionally, materials other than the Act itself (such as second reading speeches and explanatory memoranda) could only be relied upon *after* attempts to interpret the "plain words of the statute itself" had left an unresolved ambiguity or uncertainty.

The modern common law approach is that extrinsic material may be considered in order to provide context regardless of the presence of ambiguity or uncertainty, an approach which now finds statutory support[22].

The High Court put it this way, in *CIC Insurance*[23]:

"[The] modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ...., one may discern the statute was

[21] *Derisi v Vaughan* [1983] 3 NSWLR 17, at p19.
[22] *Acts Interpretation Act* 1901(Cth), s 15AB, *Interpretation Act 1987 (NSW)*, s34.
[23] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 by Brennan CJ, Dawson, Toohey and Gummow JJ).

intended to remedy. Instances of general words in a statute being so constrained by their context are numerous."

5.1 Extrinsic material must, however, be approached with caution

However, while extrinsic material may provide context, it cannot take precedence over the meaning or purpose which is derived from the statutory text itself, a proposition which logically flows from our very first observation about the primacy of the statute itself.

So, in *Saeed*[24], the High Court warned against resort to the explanatory memoranda's assertion that amendments to the Migration Act abrogated a party's right to procedural fairness, in circumstances where the effect of the legislation could be determined with reference to common law principles of statutory interpretation.

As the High Court observed:

"Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning."

Similarly, extrinsic material can only be used to interpret a legislative provision in a way which is "reasonably open"[25].

My experience is that in practice, neither explanatory memoranda or second reading speeches are generally that helpful in fixing the legislative intention, because they cannot displace the meaning as manifested in the text itself.

6. Two principles which apply to delegated legislation

Most of the principles of statutory interpretation apply to delegated legislation as well. There are two additional principles which are critical.

[24] *SAEED* (2010) 241 CLR 252, at [32] – [34].
[25] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113.

First, because delegated legislation is not made by the parliament itself, it stands or falls on whether or not it was authorised by the empowering statute[26]. In other words, is it within the scope of the regulation-making power contained within the statute?

If it can be read in a way which is consistent with the statutory regulation-making provision under which it is enacted, then it will be read in that way[27].

If it cannot be construed in a way which is consistent with the empowering Act, then it is invalid, and of no effect[28].

If it is possible to sever the offending part of the regulation which is beyond power while still giving effect to that part of the regulation which remains, then the offending part will be severed[29].

7. The operation of the common law presumptions

I want to turn now to what, as I foreshadowed, is a very interesting area of statutory interpretation, because it represents the point at which the evolving values of the common law (which we could call the culture of the courts) and the political objectives of the parliament (which we could call the culture of the parliament) come into conflict.

For this reason, it also represents the point at which the principle that the courts simply interpret and apply legislation, that is, that they are subject to the will of parliament, comes under most pressure.

What I am talking about are the common law presumptions[30] about parliament's intentions with respect to common law rights, freedoms, and immunities, which the High Court has described as reflecting *"the principle of legality"*[31], which will *"enhance the parliamentary*

[26] *Shanahan v Scott* (1957) 96 CLR 245
[27] *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297 at 304-305, 310-311, 319-321
[28] *The Queen v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170
[29] *Olsen v City of Camberwell* (1926) VLR 58 at 68
[30] There are other common law presumptions. A useful list is found in *Interpretation and Use of Legal Source*s, Herzeld, Prince and Tully (2013), p221, while a useful discussion is to be found in Pearce and Geddes, Chapter 5.
[31] *Al Kateb v Godwin* (2004) 219 CLR 562 at p577, per Gleeson CJ.

process" through *"curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate a fundamental freedom"*[32].

Pearce and Geddes have called these common law presumptions *"the courts' efforts to provide, in effect, a common law bill of rights"*[33].

The presumptions are "rebuttable", if a clear contrary intention appears in the legislation. However, as we shall see, they are not always easily rebuttable.

7.1 The power of the "common law presumptions": the principle of legality trumps apparent legislative intent

The High Court outlined the doctrinal basis for the presumptions as follows, in *Saeed*[34]:

"The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with ***irresistible*** *clearness, derives from the principle of legality which, as Gleeson CJ observed in* ***Electrolux Home Products Pty Ltd v Australian Workers' Union****, "governs the relations between Parliament, the executive and the courts."* [My emphasis.]

His Honour added [at 23]:

"The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

In the following section, I want to focus on how this *"aspect of the rule of law"* has been used to thwart the apparent intention of the legislature, focusing upon one type of statutory provision in particular, the privative clause.

[32] *Coco v R* (1994) 179 CLR 427, at pp 437 and 438.
[33] Pearce and Geddes, *op. cit.* [5.2]
[34] (2010) 241 CLR 252

Developing High Court jurisprudence with respect to privative clauses provides a practical example of how the "common law presumptions" can be used to implement "common law" values.

In this area, as a result of the "creative tension" between the apparent will of parliament and the values of the common law, the High Court has entrenched a minimum level of judicial oversight of State and Commonwealth decisions, whether they be made by an administrator, administrative body, or lower court.

Indeed, the High Court showed similar tenacity in *Saeed* itself. *Saeed* is one of a line of cases in which the High Court refused to recognise an apparent statutory intention to preclude natural justice with respect to decisions about whether parties were entitled to visas to come to or remain in Australia.

7.2 Privative clauses

Privative clauses are clauses enacted by Parliament which appear to prevent recourse to the courts to review decisions of inferior courts, administrators, or administrative bodies.

Nothing is more difficult for a court to accept, however, than that the Parliament could have intended to relieve them of their duty to ensure that decision-makers act lawfully.

The Court sees inherent in a privative clause a contradiction; the particular statute grants powers which have limits and duties attached to them, but the statute then states that the decision stands and is valid even if those limits and duties are not observed.

As Griffith CJ said in 1909[35], *"a grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms."*

An additional issue, at Commonwealth level, is the presence of section 75(v) of the Constitution. Section 75(v) empowers the High Court to issue prerogative writs, now commonly known as "the constitutional writs", the means by which the High Court invalidates a decision which is beyond the power of the decision-maker.

[35] *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114.

7.2.1 The privative clause in S157

In S157[36], the High Court dealt privative clauses a fundamental blow, where federal administrative decision-making power is involved.

The privative clause which the High Court was considering was a step in the ongoing efforts waged by governments of both persuasions to restrict review of migration decisions by the courts.

"S157" was a disappointed Bangladeshi asylum-seeker who wanted to challenge an unfavourable decision of the Refugee Review Tribunal.

He was confronted by the following apparently clear statement of legislative intention, in the form of section 474 of the *Migration Act*:

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court or on any account….

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, ***under this Act*** *or under a regulation or other instrument made* ***under this Act*** *(whether in the exercise of a discretion or not……"* [My emphasis.]

On the face of it, this was a strong privative clause, attacking, in apparently unambiguous terms, both the right to seek review (s474(1)(b)), and the power of a court to grant an effective remedy *"on any account"* (s474(2)).

[36] (2002) 211 CLR 476.

Gaudron, McHugh, Gummow, Kirby and Hayne JJ gave a joint judgment, outlining a number of steps involved in determining whether a decision was protected by a privative clause, and if so, to what extent.

Their Honours focused on a preliminary step in determining a privative clause's effect.

That first step was to ascertain its meaning or *"to ascertain the protection it purports to afford"* (at [70]).

In other words, what does it apply to, or what type of decision is it intended to protect?

Their Honours referred to two "basic rules" of statutory construction (at [71] and [72]) relevant to the interpretation of privative clauses;

The first[37] is that:

"..if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation consistent with the Constitution that is fairly open."

The second is that it is presumed that Parliament does not intend to cut down the jurisdiction of the courts any more than the legislation in question expressly states or necessarily implies. Accordingly privative clauses are strictly construed.

The first rule, that legislation should be read so as to be consistent with the Constitution, was relevant in two ways.

First, the privative clause had to be read consistently with the High Court's power to grant prerogative relief pursuant to section 75(5) of the Constitution, if possible.

Second, it would be inconsistent with the Constitution to allow a Commonwealth body exercising administrative power to determine the limits of its own jurisdiction, because if it did so, it would be exercising judicial power.

Armed with these common law principles, the answer proved strikingly simple; the privative clause protected only those decisions made *"under this Act"*.

[37] *S157*, *op. cit.*, at [71].

Any decision which was not within the power of the decision-maker would not be a decision made under the Act; it would be an invalid decision, and thus only *"a purported decision"*.

The privative clause did not protect decisions which were in excess of jurisdiction, therefore, it did not operate to expand the jurisdiction of the decision-maker.

There is a certain circularity in the Court's reasoning; the privative clause is not expressed as operating with respect to decisions affected by jurisdictional error, therefore, it does not apply to expand the field in which the decision-maker can operate without falling into jurisdictional error.
Although the "second basic rule" of statutory construction referred to by the Court did not receive a further mention in the Court's judgment, there can be little doubt that it played a role in the Court's decision.

In other words, remembering the language of *Electrolux*, the privative clause did not preclude review for jurisdictional error, or expand the jurisdiction of the decision-maker with *"irresistible clearness"*, and thus judicial review was not excluded.

If it had in fact, excluded judicial review, it would have been inconsistent with section 75(v) of the Constitution, and thus invalid (at [75]).

The effect of *S157* is that, as a general rule, there is now an entrenched minimum standard of judicial review in relation to Commonwealth decisions which cannot be excluded by the legislature[38].

[38] *Futuris* (2008) 237 CLR 146, is an exception. Section 175 provided that a tax assessment under the *Income Tax Assessment Act* 1936 (Cth) was not to be taken to be invalid because of non-compliance with the Act.The majority of the High Court held that it was effective to immunise such assessments from section 75(v) review.
However, it is best explained by reference to the fact that there were comprehensive merits review procedures, and a right to judicial review of those decisions, even though the majority did not base the decision on those facts.

7.2.2 The privative clause in Kirk v IRC.[39]

The method by which the High Court reached its decision in *S157*, by reference to section 75 of the Constitution, left open the possibility that privative clauses at State level might enjoy greater success.

That possibility was diminished by the High Court's decision in *Kirk*[40].

In *Kirk*, the issue which the High Court was considering was whether section 179 of the *Industrial Relations Act* 1996 (NSW) operated to prevent judicial review of a decision of the Industrial Relations Commission by the Supreme Court of New South Wales.

Section 179 was in its terms every bit as discouraging to judicial review as section 474 of the *Migration Act*.

Indeed, it even stated that it protected against "purported decisions".

The Court[41] held that there was a power, every bit as entrenched as the High Court's power to review federal decisions, in the Supreme Court of each State, to quash decisions for jurisdictional error.

The Court said:

"In considering State legislation, it is necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description "the Supreme Court of a State", and the constitutional corrollary that "it is beyond the legislative power of a State so as to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description"". (At [96].)

"The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial powers by persons and bodies other than the Supreme Court." (at [105]).

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[39] *Kirk v IRC* (2010) 239 CLR 521
[40] *Kirk v IRC, op. cit.*
[41] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

In summary, legislation which removed the supervisory jurisdiction of a State Supreme Court would be inconsistent with the Constitution, and hence invalid (at 100).

Just as in *S157*, the Court read the privative clause *"in a manner which takes account of these limits on the relevant legislative power"* (at [101]), which meant that *"Section 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error. To grant certiorari on that ground is not to call into question a "decision" of the Industrial Court as that term is used in s 179(1)*". (At [105].)

The High Court attributed a highly artificial and restricted meaning to the expression "purported decisions" which thus avoided the privative clause operating to protect decisions involving jurisdictional error from [103] – [105].

In both *S157* and *Kirk*, the High Court applied common law presumptions to divine a statutory intention which appears to be the opposite of that which would be divined if the words were given their ordinary meaning and effect.

When attempting to oust the jurisdiction of the courts, speaking with *"irresistible clearness"* is very difficult to do!

8. Conclusion

We started by observing the significance of statute law in nearly all areas of modern legal practice.

We observed that the apparently straight-forward task of statutory construction is to give effect to the intention of parliament as manifested in the statute itself, "in accordance with principles of construction established by the common law and statute".

In fact, "the principles of construction" are many and varied, some purely technical, and others value-laden. Their application in practice is a mixture of art, science, and experience.

Statute law has traditionally been treated as of less importance in common law jurisdictions, and is not currently a compulsory subject for law students.

However, a good, practical understanding of how to apply the tools of statutory construction will greatly assist you in your work.